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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas

CC Docket No. 00-4

REPLY COMMENTS OF BELLSOUTH

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BellSouth files these reply comments to address two specific issues of particular importance. *First*, the Department of Justice (DOJ) has wrongly asked this Commission effectively to nullify the benefits of the separate affiliate option for proving parity in the provision of xDSL services. The Commission should reject that approach as inconsistent with its prior precedent and with the public interest. *Second*, commenters improperly ask this Commission to become an original finder of fact regarding questions that were – or could have been – presented to the states, a function that the Commission has held is the domain of the state commissions. This Commission should adhere to its prior decisions and continue to defer to the states' expert judgment on such fact-intensive issues. In the same vein, the Commission should expressly recognize here that there is no single way for a state to review a Bell operating company's compliance with section 271; the fact that a particular state's approach differs from the one adopted in New York (or Texas, for that matter) provides no reason to reject a section 271 application.

1. The Commission specifically addressed the ordering and provisioning of unbundled loops for xDSL service in its *New York Order*.[1] That order addressed this issue for the first time because xDSL services are new, and demand for xDSL-capable loops is only now emerging.[2] The *New York Order* establishes two ways in which section 271 applicants may prove nondiscriminatory provisioning of these loops: (1) certain identified forms of data or (2) a separate affiliate. With respect to the separate affiliate option, the Commission stated that it would "find it most persuasive if future applicants under section 271, unlike this applicant, make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops . . . through proof of a fully operational separate advanced services affiliate . . . , which *may* also include appropriate performance measures."[3]

The DOJ now argues that, in order for the separate affiliate option to establish nondiscrimination, the BOC *must* show not only that the affiliate is established as a matter of law and is up and running, but also "that the implementation of the separate affiliate structure has in fact resulted in nondiscriminatory performance."[4] The DOJ thus transforms the Commission's intended alternative options into: (1) performance data showing nondiscriminatory performance or (2) an affiliate *plus* performance data showing nondiscriminatory performance.

The Commission should reject the DOJ's argument. The Commission's *New York Order* reflects the fact that providing xDSL-capable loops is a new service, and sets out requirements that are intended to ensure nondiscriminatory access to the facilities necessary to provide xDSL

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[1] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404 (rel. Dec. 22, 1999) ("*New York Order*").
[2] *Id.* ¶¶ 316-336.
[3] *Id.* ¶ 330 (emphasis added).
[4] DOJ Eval. at 26.

service without harming consumers by unduly delaying BOC section 271 applications. The Commission thus recognized that the establishment of an affiliate that adheres to appropriate separation rules, together with evidence of nondiscriminatory performance with respect to unbundled loops generally, provides perfectly adequate assurances of nondiscrimination. The DOJ, by contrast, would require the BOC *first* to create a separate advanced services affiliate under option 2 and, after that is done, *then* provide an additional evidentiary showing akin to that required under option 1. The impact of this unnecessary stacking of requirements would be months of delay in bringing the public-interest benefits of BOC entry into the interLATA market, should the BOC chose the option of a separate affiliate.

The DOJ, it seems, seeks perfect evidence of nondiscrimination with respect to DSL-capable loops. But, as the Commission has already quite rightly stated, "in such a complex endeavor as a section 271 proceeding, no finder of fact can expect proof to an absolute certainty."[5]

This is an important issue because the Commission will face it not just with respect to xDSL-capable loops, but each time a new service is offered or conceived. Each new service arrives, quite naturally, with a relative paucity of evidence. In determining the showing of nondiscrimination required in such contexts, the Commission must balance the public-interest benefits of quick BOC entry when the local market is open, against the need for additional evidence showing compliance with statutory requirements. As the Commission recognized in the *New York Order* and should reiterate here, the submission of data measuring a BOC's performance *or* a properly established separate affiliate provides sufficient assurance in such contexts without unnecessarily delaying BOC entry into long-distance markets. The

[5] *New York Order* ¶ 48.

Commission should not allow a service that represents a small part of one of the multitude of requirements for section 271 approval to delay further the public benefits of BOC entry into the interLATA market.

2. In the *New York Order*, the Commission noted that, "[g]iven the 90-day statutory deadline to reach a decision on a section 271 application, the Commission does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor."[6] It thus looked to the expert state commission to resolve such matters and determined that, "where the state has conducted an exhaustive and rigorous investigation in the BOC's compliance with the checklist,"[7] the Commission will give such evidence substantial weight. Despite the Commission's explicit holding on that point, commenters in this proceeding repeatedly attempt to draw the Commission into factual controversies that were or could have been addressed before the Texas Commission on such matters as Southwestern Bell's interconnection trunk deployment, order processing, and data collection.

Those arguments should again be rejected. Both the language and intent of the 1996 Act refute these commenters' view of this Commission's appropriate role. Although the Supreme Court's decision in *AT&T v. Iowa Utilities Board*[8] vindicated the Commission's assertion of jurisdiction over a large swath of local competition issues,[9] both the Commission and the Court recognized that states would continue to play an indispensable role in setting prices and promulgating standards under the Act. Before the Eighth Circuit, for example, the Commission

[6] *Id.* ¶ 51.
[7] *Id.*
[8] 119 S. Ct. 721 (1999).
[9] *Id.* at 732-33.

neither "contest[ed] the fact that state commissions have the responsibility to set prices" nor "claim[ed] that the FCC's pricing authority [was] exclusive."[10] Instead, the Commission and the CLECs "argue[d] that the Act establishes shared or parallel jurisdiction between the states and the FCC."[11] The Supreme Court accepted the Commission's position that the Act intended to set up a parallel jurisdictional regime, explicitly acknowledging that the states perform a critical function in this statutory scheme.[12]

Similarly, the Commission has repeatedly recognized in the context of section 271 that state commissions' familiarity with local carriers and local market conditions gives them special insight and expertise. As Commissioner Powell put it, the Commission should "defer[] to [the state commissions'] judgments, according to the unique strengths and perspectives they . . . bring to the local market-opening process."[13] Even before giving substantial deference to the conclusions of the New York Public Service Commission, the Commission stated that it will give special consideration to those "state determinations of fact that are supported by a detailed and extensive record."[14] A state's findings under section 271 deserve close attention not only because they have a special position under the statute,[15] but also because this Commission is not

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[10] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).
[11] *Id.*
[12] "It is the States that will apply [the pricing] standards and implement [the] methodology, determining the concrete result in particular circumstances." *Iowa Utils. Bd.*, 119 S. Ct. at 732.
[13] *See Wake-Up Call: FCC Commissioner Michael Powell Calls for New "Collaborative Approach" to Section 271 Applications*, FCC, Jan. 15, 1998, *available in* 1998 FCC LEXIS 191, at *8.
[14] Memorandum Opinion and Order, *Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20617, ¶ 18 (1998); Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, 20560, ¶ 30 (1997) ("*Ameritech Michigan Order*").
[15] *See* 47 U.S.C. § 271(d)(2)(B).

capable – particularly within the 90 days allotted for its review of Bell company applications – of duplicating the state commission's exhaustive, "live" investigations and their local market expertise developed through arbitration proceedings. These legal and practical considerations reinforce the general point, expressed by Chairman Kennard, that "[t]he goal of assuring competition . . . will only be achieved if the FCC and the states work together."[16]

Moreover, part and parcel of such a cooperative endeavor is the recognition that states may permissibly follow different routes in determining compliance with section 271. In particular, the Commission has given Bell companies broad latitude in demonstrating nondiscriminatory access to their OSS. A BOC may present "operational evidence to demonstrate that the operations support systems functions the BOC provides to competing carriers will be able to handle reasonably foreseeable demand volumes for individual checklist items."[17] The Commission has not required any particular type of "operational evidence": "such evidence *may* include carrier-to-carrier testing, independent third-party testing, and internal testing of operations support systems functions."[18] Not only is no particular type of testing required, but the Commission has indicated that testing is a "less reliable indicator[] of actual performance than commercial usage."[19]

This broad mandate properly leaves the states wide latitude in reviewing, or even developing, testing programs that answer market-specific questions about the Bell company and CLEC systems used in that market. The point is not that the New York or Texas models are inadequate in any respect (they are not), but rather that the variety of approaches that states have

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[16] *Statement of William Kennard, Chairman of the FCC, on the Filing of Petition for Writ of Certiorari*, FCC, Nov. 19, 1997, *available in* 1997 FCC LEXIS 6388, at *1.
[17] *Ameritech Michigan Order*, 12 FCC Rcd at 20602, ¶ 110.
[18] *Id.* (emphasis added).
[19] Id. at 20618, ¶ 138.

taken should be encouraged. Testing is simply too dependent on the specific characteristics of each Bell company, the readiness of particular CLEC systems, and the local market conditions for the Commission to embrace any state's testing model as a nation-wide testing regime.[20]

For the foregoing reasons, BellSouth respectfully requests that the Commission reject the aforementioned efforts to create new barriers to section 271 relief.

Respectfully submitted,

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[20] *See, e.g.*, ALTS Comments at 84-85.